Supreme Court, U.S.
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No. 92-360

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner,
v.
LINCOLN BOLYARD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Can the punitive damages awarded by one jury be sustained under the due process principles announced in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), when a second jury, which heard the same evidence from the same witnesses in the same courtroom at the same time, found no punitive damages?

2. Does due process permit a state court jury to impose punitive damages without *any* appellate review?

3. Does due process permit repetitive awards of punitive damages for the same course of conduct in the absence of any mechanism for ensuring that the *total* punitive damages do not exceed the amount necessary for deterrence and punishment?

PARTIES AND RULE 29.1 STATEMENT

The parties and statement required by Rule 29.1 were included in Petitioner's petition for certiorari.

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1. The award of punitive damages against Owens-Illinois, Inc. ("Owens-Illinois") in this case was not subject to *any* substantive review by the trial or appellate courts. The trial court summarily and without explanation denied Owen-Illinois' motion for judgment notwithstanding the verdict. *See, e.g.*, Supplemental Appendix at SA-7, SA-10, SA-12 (Judgment Orders providing that "all motions for judgments notwithstanding the verdict and for new trials are hereby denied"). The West Virginia Supreme Court of Appeals declined to review Owens-Illinois' petition for appeal despite its announcement in *Fleming Landfill, Inc. v. Garnes*, 413 S.E.2d 897, 900 (W. Va. 1991), that the court would "review all punitive damages awards." The court later emphasized the importance of its decision in *Garnes* to previously-decided punitive damages cases. In a case decided in May, 1992, the West Virginia

court recognized that remand of every case not meeting the technical requirements of *Garnes* "would unnecessarily send far too many cases back for retrial," but went on to state: "We will, however, be especially diligent in our review of any punitive damages awards entered before *Garnes* was decided." *TXO Prod. Corp. v. Alliance Resources Corp.*, No. 20231, slip op. (W. Va. May 14, 1992), *petition for cert. filed*, No. ——— (Sept. 17, 1992).

The first ground asserted by Respondents Lincoln Bolyard, et al. ("Respondents") is that Owens-Illinois "failed to avail itself of the opportunity" to argue to the trial and appellate courts the standards applied on review of an award of punitive damages as announced by the West Virginia Supreme Court of Appeals in *Garnes*. Brief in opposition at 13-14. Bolyard criticizes Owens-Illinois' alleged failure to address "each and every factor [set forth in *Garnes*] with particularity." *Id.* at 14.

Respondents' argument completely disregards the fact that the decision in *Garnes* was announced more than nine months *after* review of the *Bolyard* punitive damages award by the trial court, and two months *after* Owens-Illinois briefed its due process arguments for the West Virginia Supreme Court of Appeals. For Respondents to attack a failure to discuss the *Garnes* factors in proceedings that pre-date that decision is disingenuous.

Respondents' argument also disregards the fact that Owens-Illinois argued extensively in its petition for appeal to the West Virginia Supreme Court of Appeals that the protections against excessive awards approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), were not provided at trial, and that due process required that the punitive damages award be reviewed on appeal by application of detailed and substantive standards like those approved in *Haslip*.

The decision in *Davis v. Celotex Corp.*, No. 20651, slip op. (W. Va. June 12, 1992)—relied upon by Respondents

as the explanation for no appellate review here—also post-dates the *Bolyard* proceedings and is incorrectly interpreted by Respondents: in that case the West Virginia court merely stated that it would not set aside pre-*Garnes* awards of punitive damages in cases where the award is reasonably related to the compensatory damages, is supported by the factual evidence, "*and if the parties' main assignment of error* is that the trial court's instruction did not contain all of the factors enunciated in *Garnes*." *Id.* (emphasis added). Owens-Illinois' challenge to the punitive damages award is not based on the jury instructions (except to the extent those instructions directed the jury that Owens-Illinois' product was defective as a matter of law); rather, Owens-Illinois has argued that *Haslip* requires review of the award by application of "detailed substantive standards" in order to comport with due process. *See Haslip*, 111 S. Ct. at 1045 (observing that application of these standards have "real effect" in constraining the discretion of Alabama fact finders).

Due process requires that West Virginia afford its litigants protection against excessive awards of punitive damages, and *Haslip* provides that protection is supplied by careful post-verdict review of those awards. *See id.* at 1044 (post-verdict review "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages"). This Court should grant certiorari to further develop the principles in *Haslip* by holding that a punitive damages verdict that is subject to *no* limits on the jury's discretion violates due process.

2. The Fourth Circuit *en banc* recently emphasized the importance of the substantive standards applied on review of punitive damages awards in Alabama state courts and approved in *Haslip*. In *Johnson v. Hugo's Skateway*, Nos. 90-2499, 90-2509, slip op. (4th Cir. Sept. 8, 1992) (*en banc*), a diversity action tried in federal district court in Virginia, the Fourth Circuit vacated and re-

manded an award of punitive damages as inconsistent with the standards announced in *Haslip*. The court determined that while Virginia law might provide the substantive standards required on review of an award pursuant to *Haslip*, the federal court sitting in diversity is prohibited by the Seventh Amendment from applying those standards (which necessarily require taking new evidence) on review of a jury verdict. In doing so, the court stated that the "limited scope of review" afforded in federal court pursuant to Fed. R. Civ. P. 59 denied defendant due process. The court concluded that due process requires federal courts in diversity actions to compensate for this limited review by including in instructions to the jury substantive factors like those applied on review of an award of punitive damages by Alabama courts and approved in *Haslip*.

The Fourth Circuit's *en banc* decision in *Hugo's Skateway* emphasizes the significance of including substantive and meaningful standards in the punitive damage award process, either on review of the award or in instructions to the jury. Indeed, the court observed that substantive review by the state trial and appellate courts was "critical" to this Court's approval of Alabama law in *Haslip*. *Id.* The West Virginia Supreme Court of Appeals disregarded the guidance provided by *Haslip* (and the pronouncement in *Garnes* that the court would review all petitions of appeal from awards of punitive damages), and let the *Bolyard* awards stand without *any* appellate review. This result is inconsistent with *Haslip*, and illustrates the need for this Court to clarify the due process principles announced in that case.

3. Respondents also argue that the trial record does not reflect evidence relevant to the factors to be applied on review of a punitive damages award pursuant to *Garnes*. Brief in opposition at 14. In making this argument, Respondents lose sight of the function of post-verdict review of the award of punitive damages. In *Haslip*, this

Court approved Alabama law governing punitive damages, which provided in part that while evidence of defendant's net worth properly is kept from the jury, it may be considered by the reviewing courts in determining the excessiveness of the award. *Haslip*, 111 S. Ct. at 1044-45. The West Virginia court similarly recognized that "all of the information [relevant to the review factors] is not available to the jury," and that the trial court must consider that information (defendant's financial condition, good faith settlement negotiations) when reviewing the award. *Garnes*, 413 S.E.2d at 909. Indeed, the court properly noted that this evidence must be excluded at trial as unduly prejudicial. *Id.*

4. It is Respondents' position that the constitutionality of multiple awards of punitive damages need not be addressed by this Court because the West Virginia court has determined that repetitive awards are consistent with West Virginia law: Respondents repeatedly suggest that because the award of punitive damages in this case "further[s] the purpose of such awards under West Virginia law," this Court should deny the petition for a writ of certiorari. *See* Brief in opposition at 16; *see also* Brief in opposition at 6.

Respondents' argument fails in two important respects. First, whether due process is violated by multiple awards of punitive damages for a single course of conduct is a matter of federal constitutional law.

Second, the West Virginia court's decision in *Davis v. Celotex Corp.*, No. 20651, slip op. (W. Va. June 12, 1992) did not conclusively establish that multiple awards are appropriate pursuant to West Virginia law: the court specifically announced that a challenge to multiple awards of punitive damages might be appropriate and would be addressed by that court in cases presenting "sufficient facts to answer the question of whether substantive due process has been violated by multiple punitive damage awards." *Id.*

The *Bolyard* punitive damages awards are unconstitutional because Owens-Illinois already has paid punitive damages for the course of conduct alleged in these consolidated cases. *See, e.g., Johnson v. Celotex Corp.*, 899 F.2d 1281, 1288 (2d Cir.) ($1.8 million award of punitive damages in two cases against Owens-Illinois), *cert. denied*, 111 S. Ct. 297 (1990); *In re: New York City Asbestos Litig.*, 572 N.Y.S.2d 1006 (N.Y. App. Div. 1991) (consolidated cases resulting in award of punitive damages against Owens-Illinois). Repeated punishment violates the due process principles announced in *Haslip*. *See Haslip*, 111 S. Ct. at 1044-45 (due process prohibits punitive damage verdicts that exceed the amount necessary to serve the goals of retribution and deterrence). This case presents the appropriate vehicle for this Court to consider the due process concerns implicated by multiple awards of punitive damages for a single course of conduct.

Respectfully submitted.

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